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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRANDON DAVIS, Defendant and Appellant.	B205691 (Los Angeles County Super. Ct. No. PA055927)

APPEAL from a judgment of the Superior Court of Los Angeles County. Graciela C. Freixes, Judge. Affirmed.

Law Office of Jonathan La France and Leslie F. Nadasi for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant and appellant Brandon Davis appeals from the denial of a motion to withdraw his guilty plea. He asserts that the trial court abused its discretion because he established good cause for the withdrawal pursuant to Penal Code section 1018 by showing that he suffered from a mental deficiency rendering him unable to comprehend the consequences of his plea. He also claims that he received ineffective assistance of counsel in that his former attorney did not adequately communicate with him, failed to advise him to file either a motion to suppress or quash and did not file any defensive motions. Finally, he contends that the plea agreement's provision permitting the prosecution to withdraw from the agreement should be construed reciprocally to apply to him. We find no merit to these contentions and affirm the denial of the motion.

FACTUAL AND PROCEDURAL BACKGROUND

Toby Darby, a detective with the Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force who had received specialized training in the field of narcotics and their manufacture, use, transport and sale, received information from a confidential informant (CI) during the six months preceding January 2007 regarding a person selling marijuana in the City of Los Angeles. The CI knew the person as "Brandon" and described his physical characteristics, vehicle and area of residence. Through investigation, Detective Darby identified appellant. On January 8, 2007, while surveilling appellant, Detective Darby and other officers observed him in a restaurant meeting with a female who had not ordered any food and shortly thereafter exchanging a clear plastic bag for money with a male standing in the restaurant.

Detective Darby prepared an affidavit in support of a search warrant which indicated that, on the basis of his observations and experience, he believed marijuana and other narcotics paraphernalia would be found in appellant's residence and vehicle. The trial court authorized the search warrant on January 23, 2007. During a search conducted on January 30, 2007, officers recovered over ten pounds of marijuana, four ounces of cocaine, twenty-five Vicodin pills, four ounces of psilocybin, a loaded handgun and over $80,000 in cash. Appellant was placed under arrest. In an interview with police,

appellant admitted that the narcotics found in his home and vehicle were his, described how he purchased his narcotics and stated that selling narcotics was his primary source of income.

A felony complaint filed by the Los Angeles County District Attorney on March 2, 2007 charged appellant with selling cocaine in violation of Health and Safety Code section 11352, subdivision (a)[1] (count 1); possession of cocaine for sale in violation of section 11351 (count 2); selling marijuana in violation of section 11360, subdivision (a) (count 3); possession of marijuana for sale in violation of section 11359 (count 4); and possession of psilocybin for sale in violation of section 11378 (count 5). The complaint further alleged that appellant had suffered prior convictions.

At arraignment, appellant pleaded not guilty. On May 29, 2007, the matter was called for preliminary hearing and appellant changed his plea pursuant to a plea agreement. Appellant was advised of and expressly waived his right to a preliminary hearing and jury trial; to call, confront and cross-examine witnesses; and against self-incrimination. He was further advised of the charges against him as well as the consequences of his guilty plea. Appellant responded affirmatively to the trial court's inquiry as to whether he understood what he had been told and further stated that he had no questions. The trial court found that each waiver of appellant's rights was knowingly, understandingly and explicitly made, and counsel joined in the waivers and concurred in the plea. Appellant pleaded guilty to possession of cocaine for sale (count 2) and admitted a prior conviction enhancement pursuant to section 11370.2, subdivision (a). As part of the negotiated plea, the prosecution offered a five-year sentence, comprised of two years on count two plus three years for the enhancement.

On September 18, 2007, appellant, through new counsel, moved to withdraw his plea on the grounds that he was not competent to knowingly and voluntarily enter his plea and that he received ineffective assistance of counsel. In support of the motion,

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[1] Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

appellant submitted his counsel's and his own declaration. According to those declarations, appellant had only limited time with his prior retained attorney, who had not discussed the possibility of filing any defensive motions. The declarations further indicated that appellant had been examined by psychologist Jeff Whiting, Ph.D., to provide an opinion regarding appellant's mental capacity to enter a plea. In a conversation with new counsel, appellant's prior counsel characterized appellant as "slow." The prosecution opposed the motion and attached as exhibits to the opposition the search warrant and affidavit, the police report and a reporter's transcript of appellant's plea.

At an October 30, 2007 hearing, the trial court denied the motion. Following counsel's arguments, the trial court indicated it had reviewed all the papers filed in connection with the motion, including a document entitled "Report on Brandon Davis" submitted by Dr. Whiting,[2] and thereafter ruled from the bench, stating: "The court finds that the defendant has failed to establish that his prior counsel's representation fell below an objective standard of reasonableness and has failed to show prejudice. The court does not find merit in defendant's argument that he lacked the mental capacity to make a free, voluntary, knowing and intelligent decision to accept the People's offer for early disposition of this case and enter his guilty plea. The declaration of Dr. Jeffrey Whiting in support of that position indicates that the defendant reported having had a tumor of unknown location or ideology removed from the back of his brain at the age of three. The defendant is now 36 years of age. And according to Dr. Whiting's declaration, the defendant reports he has had no follow-up care for any problems related to the purported tumor since it was removed 33 years ago. Further, Dr. Whiting's declaration indicates

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2 Although the trial court stated that Dr. Whiting's report was attached to appellant's reply to the motion to withdraw, appellant did not include that report as part of the record on appeal. Following oral argument, we granted appellant's request to take judicial notice of the report, although it would have been within our discretion to deny the request. (See *In re Caswell* (2001) 92 Cal.App.4th 1017, 1024, fn. 1 [appellate court declined to take judicial notice of materials inadvertently omitted from the record].)

that he reviewed no medical or other records whatsoever relating to the defendant's purported brain tumor or any related care or concerns received by the defendant during the 36 years that he has been alive. In reviewing the transcript of the defendant's plea in this court on May 29th, 2007, the court notes that the defendant was fully apprised of his constitutional rights and the consequences of entering the plea. The defendant was questioned concerning his understanding of each of his rights and each consequence of entering the plea. He was further asked by this court whether he had any questions prior to entering the plea, and he indicated that he did not. There was nothing equivocal about any of the defendant's responses throughout the proceeding. Therefore, based on the totality of the circumstances in this case, and having thoroughly reviewed all of the pleadings, declarations, and exhibits submitted by both the defense and the prosecution in this case, as well as the court's file, it is the court's determination that the defendant's plea of guilty was made intelligently, freely, knowingly, voluntarily, and with a full understanding of the nature and consequences of entering the plea."

In January 2008, the trial court sentenced appellant to a term of five years, comprised of the low term of two years on count two and three years for the section 13970.2, subdivision (b) enhancement. It dismissed the remaining counts pursuant to the negotiated plea agreement. The trial court issued a certificate of probable cause and this appeal followed.

DISCUSSION

Penal Code section 1018 provides: "On application of the defendant at any time before judgment . . . the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice." A defendant has the burden to demonstrate good cause by clear and convincing evidence. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

Appellant contends that he established good cause by showing that he suffered from a mental deficit, he was unaware of the possibility of filing defensive motions

before entering a plea and he received ineffective assistance of counsel. We review a trial court's denial of a motion to withdraw a guilty plea for an abuse of discretion. (*People v. Holmes* (2004) 32 Cal.4th 432, 443; *People v. Mickens* (1995) 38 Cal.App.4th 1557, 1561.) "Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them." (*People v. Fairbanks* (1997) 16 Cal.4th 1223, 1254.) """Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged." [Citation.]"" (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 123.) With these principles in mind, we find no basis to disturb the trial court's careful exercise of discretion in denying appellant's motion to withdraw his guilty plea.

I. Appellant Failed to Show He Did Not Knowingly and Voluntarily Enter His Guilty Plea.

To establish good cause to withdraw a guilty plea, the defendant must show by clear and convincing evidence that he or she was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment, including inadvertence, fraud, or duress. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1207–1208.) The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake. (*In re Moser* (1993) 6 Cal.4th 342, 352.) A plea may not be withdrawn simply because the defendant has changed his mind. (*People v. Huricks, supra,* at p. 1208.)

Appellant contends that he presented sufficient evidence to show that he was suffering from a mental deficit which rendered him unable to understand his communications with prior counsel, including the consequences of his plea and his ability to file motions before entering his plea. The "evidence" of this deficit initially provided in the record on appeal is contained in appellant's counsel's declaration in which counsel stated that Dr. Whiting had "serious concerns" about appellant's competency, and appellant's declaration in which he stated that he was "informed and believe that I do not have the mental capacity to understand the nature of the charges and my defenses in the

limited time I had to discuss my case with my attorney." As indicated earlier, Dr. Whiting's report is not part of the record. Rather, the only information as to the contents of that report is contained in counsel's and the trial court's comments about that report at the hearing on the motion.

"It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal. [Citations.]" (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385; see also *People v. Green* (1979) 95 Cal.App.3d 991, 1001 [""""error is never presumed, but must be affirmatively shown, and the burden is upon the appellant to present a record showing it, any uncertainty in the record in that respect being resolved against him""""].) By failing to include Dr. Whiting's report as part of the record on appeal, appellant cannot meet his burden to show any abuse of discretion on the part of the trial court in ruling there was no merit to his claim that he lacked the mental capacity to make a free, knowingly and voluntary decision to accept the plea bargain.

But even if we were to consider the contents of the report submitted with appellant's belated request for judicial notice, our conclusion would be the same. Dr. Whiting reported that appellant's verbal comprehension index and his processing speed index were in the fourteenth and eighth percentiles, respectively. As a result, Dr. Whiting opined that appellant processes information at an exceedingly slow rate when compared with the rest of the population. Nonetheless, appellant did not contend in his declaration supporting the motion to withdraw his plea that his plea was taken too quickly or that he was unable to make a knowing and voluntary decision due to time constraints. As indicated earlier, the trial court expressly took the totality of this information into account in determining that appellant failed to meet his burden to show he did not freely and knowingly enter his plea. (See *People v. Hunt* (1985) 174 Cal.App.3d 95, 104 [where evidence submitted in connection with motion to withdraw plea is contradictory, the trial court is entitled to resolve the factual conflict against the defendant].)

Nor has appellant met his burden to show the trial court abused its discretion in rejecting his claim that, because of his mental deficit, he lacked a full understanding of his abbreviated contact with his prior counsel. According to appellant's declaration, he accepted the plea bargain after having only two thirty-minute conversations with his prior counsel, at which time counsel did not discuss other options available to appellant, including the filing of defensive motions, appellant's constitutional rights or his right to a preliminary hearing. But in ruling on a motion to withdraw a plea, the trial court is not required to accept a defendant's statements, even if they are uncontradicted. (*People v. Hunt, supra,* 174 Cal.App.3d at p. 103; see also *People v. Beck* (1961) 188 Cal.App.2d 549, 553 [observing "that the trial court was not bound to give full credence to the statements in defendant's affidavit in support of his motion to withdraw his pleas of guilty even though they are uncontradicted because of defendant's obvious interest in the outcome of the proceeding"].) Instead, the trial court had discretion to consider its own observations of appellant as well as appellant's responses to the court's multiple admonitions concerning the impact and consequences of his plea in concluding that appellant failed to show good cause for the withdrawal of his plea. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1180 [court considers the totality of the circumstances in assessing the constitutional validity of a guilty plea].) Indeed, shortly before appellant entered his plea, he answered "Yes" to the trial court's direct question "Have you discussed with your attorney the charges, possible defenses, and the consequences of pleading?" That appellant may have had an inaccurate impression of the strength of the prosecution's case on the basis of his discussions with counsel does not amount to good cause to withdraw his plea. (*People v. Watts* (1977) 67 Cal.App.3d 173, 183.)

The circumstances here bear no resemblance to those in *People v. McGarvy* (1943) 61 Cal.App.2d 557, a case on which appellant relies. There, the defendant was arrested on a Sunday and entered a plea of guilty to a manslaughter charge the following Tuesday after having spoken for less than 30 minutes to an attorney arranged by the district attorney's office. (*Id.* at pp. 560–561.) On the basis of that evidence, the appellate court ruled "the law was not complied with by the token appearance of an

attorney brought into the case by the district attorney; that under the facts and circumstances as disclosed by the record the defendant's right to be represented by counsel of his own choice was invaded, and that therefore it was an abuse of discretion by the trial court to deny the motion of defendant." (*Id*. at p. 565.) Here, in contrast, appellant was represented by retained counsel at his arraignment on March 9, 2007, and his counsel appeared with him at three additional hearings before he entered his plea on May 29, 2007. Accordingly, none of the "undue haste" that concerned the court in *McGarvy* was present here. (*Id*. at p. 561.) The circumstances here are equally distinguishable from those in *People v. Harvey* (1984) 151 Cal.App.3d 660, where the appellate court reversed the denial of a motion to withdraw a guilty plea because the defendant's own counsel failed to inform the defendant of a psychiatric report concluding that he lacked the capacity to premeditate or form malice aforethought and those findings, if believed by the trier of fact, would have precluded any conviction of first or second degree murder. (*Id*. at p. 668.)

After evaluating the totality of the circumstances, the trial court acted well within its discretion in ruling that appellant failed to meet his burden by clear and convincing evidence to show that he entered his guilty plea under mistake, ignorance, or the overcoming of his exercise of free judgment.

II. Appellant Failed to Show He Received Ineffective Assistance of Counsel.

Appellant further contends that his plea was entered involuntarily due to his prior counsel's rendering ineffective assistance by neither challenging the validity of the search warrant nor moving to suppress evidence. (See *In re Alvernaz* (1992) 2 Cal.4th 924, 934 ["It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea"].)

"All criminal defendants have a Sixth Amendment right to effective assistance of counsel; that is, counsel acting reasonably '"within the range of competence demanded of attorneys in criminal cases." [Citation.]' (*Strickland v. Washington* (1984) 466 U.S. 668,

687.)" (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 542.) "'To establish ineffective assistance, defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.' [Citation.] 'If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation.' [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053; see also *People v. Ray* (1996) 13 Cal.4th 313, 349 ["In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission"].) This two-part test "applies to challenges to guilty pleas based on ineffective assistance of counsel." (*Hill v. Lockhart* (1985) 474 U.S. 52, 58.)

In reviewing appellant's claim, we must presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant decisions affecting appellant and we accord great deference to counsel's tactical decisions. (*People v. Holt* (1997) 15 Cal.4th 619, 703; see also *People v. Bolin* (1998) 18 Cal.4th 297, 333 ["Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts"].) For example, in *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266, the court held that the defendant failed to meet his burden to show he received ineffective assistance of counsel where counsel did not move to suppress evidence seized as a result of a pat down search; the court explained that "'[b]ecause the legality of the search was never challenged or litigated, facts necessary to a determination of that issue are lacking.'"

Implicitly acknowledging his inability to challenge his prior counsel's tactical decisions on the record before us, appellant asserts that the affidavit in support of the search warrant was inadequate on its face, suggesting that probable cause for the search did not exist as a matter of law. (Cf. *Hill v. Lockhart, supra,* 474 U.S. at p. 59 ["where

the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial"].) We find no deficiency in the affidavit supporting the search warrant.

As summarized in *Illinois v. Gates* (1983) 462 U.S. 213, 238, in determining whether there is probable cause for the issuance of a search warrant: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Detective Darby's affidavit plainly satisfied that test. Detective Darby averred that within the last six months, he received information from a CI that "Brandon" was selling marijuana in Los Angeles. The CI described Brandon with specificity "as a male, Caucasian, brown hair with a receding hairline, 5'10", 35-40 years old, with a salt and pepper goatee" and further stated that he "drove a newer GMC Denali pick-up truck and lived in the Santa Clarita Valley." On the basis of that information, Detective Darby pinpointed appellant and thereafter observed him engaging in behavior which—on the basis of his extensive experience as a narcotics investigator—Detective Darby opined was consistent with selling narcotics. Nothing more was required. (See, e.g., *People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1719 [information of the defendants' drug activity two years earlier, a confidential informant's information about a recent drug transaction and an officer's observation of heavy car traffic to and from defendants' home showed a "fair probability existed that evidence of an ongoing drug sales operation would be found at the [defendants'] home"]; *People v. Kershaw* (1983) 147 Cal.App.3d 750, 758–760 [probable cause for issuance of a search warrant shown where affidavit set forth information from a confidential informant about a drug purchase from the defendant, the defendant's prior arrest for narcotics possession and the officer's observation of multiple visitors to the defendant's home].)

Appellant's challenges to the sufficiency of Detective Darby's affidavit focus on the absence of additional information, such as the lack of surveillance videos and the failure to retrieve the plastic bag supposedly exchanged. But "[a] defendant who challenges a search warrant based upon an affidavit containing omissions bears the burden of showing that the omissions were material to the determination of probable cause." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297.) Because Detective Darby's affidavit contained sufficient information to establish probable cause, appellant could not have met this burden and thus cannot establish that a suppression motion should have been brought or would have been successful. For this reason, the trial court properly concluded that appellant could not demonstrate that he received ineffective assistance of counsel. (See *People v. Price* (1991) 1 Cal.4th 324, 387 ["[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile"].)

III. The Terms of the Plea Agreement Did Not Permit Appellant to Withdraw his Plea.

Finally, we reject appellant's contention that the plea agreement must be construed to allow him to withdraw his plea. The pertinent section of the plea agreement provided "'that if at the time of sentencing the prosecution was made aware of any additional circumstances in aggravation or prior convictions suffered, the prosecution may withdraw from the plea bargain and the defendant may withdraw his plea.'" Appellant contends that contract law principles requires this provision to be construed reciprocally, enabling either party to withdraw from the bargain. "Traditionally, courts have viewed plea agreements 'using the paradigm of contract law. [Citations.]' [Citation.]" (*People v. Knox* (2004) 123 Cal.App.4th 1453, 1458.) But analogizing the plea agreement to a contract requires that we "'should look first to the specific language of the agreement to ascertain the expressed intent of the parties. [Citations.]'" (*Ibid*.) The language of the agreement permits the prosecution to withdraw only in the event it discovers additional aggravating circumstances or prior convictions. It does not permit withdrawal under any

other circumstances or more broadly, as appellant asserts, in the event of the discovery of any new facts. Accordingly, the terms of the plea bargain afford no basis for appellant to withdraw his plea.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST